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July 23, 1997

EX PARTE

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Kathleen Q. Abernathy
Vice President
Federal Regulatory

AirTouch Communications
1818 N Street, N.W.
Suite 800
Washington, DC 20036

Telephone: 202 293-4960
Facsimile: 202 293-4970
Kathleen.Abernathy@cemail.AirTouch.COM

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JUL 23 1997

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

RE: Telecommunications Carriers' Use of Customer Proprietary Network
Information and Other Customer Information (CC Docket No. 96-115)
&
Amendment of the Commission's Rules to Establish Competitive Service
Safeguards for Local Exchange Carrier Provision of Commercial Mobile
Radio Services (WT Docket 96-162) ✓

Dear Mr. Caton:

On Wednesday, July 23, 1997, on behalf of AirTouch Communications, Inc., I met with Jackie Chorney, Senior Advisor to Chairman Hundt, to discuss the above proceedings. Please associate the attached material with the above-referenced proceedings.

Two copies of this notice are being submitted to the Secretary in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me at 202-293-4960 should you have any questions or require additional information concerning this matter.

Sincerely,

A handwritten signature in black ink that reads "Kathleen Q. Abernathy". The signature is fluid and cursive, with the first name "Kathleen" being more prominent.

Kathleen Q. Abernathy

Attachments

cc: Jackie Chorney

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AirTouch Communications, Inc.

**Telecommunications Carriers' Use of Customer Proprietary Network Information
and Other Customer Information
CC Docket 96-115**

and

**Amendment of the Commission's Rules to Establish Competitive Service Safeguards
for Local Exchange Carrier Provision of Commercial Mobile Radio Services
WT Docket 96-162**

July 23, 1997

Kathleen Q. Abernathy

NEED FOR EFFECTIVE SAFEGUARDS

- **Bell Operating Companies (BOCs) have continued control over essential bottleneck facilities.**
- **This creates a unique ability to leverage their wireline market power to advance wireless interests in instances where BOCs have in-region cellular or broadband PCS licenses.**
- **Other wireless competitors -- including new PCS entrants -- can not effectively compete absent FCC imposed safeguards that protect against discrimination and cross-subsidization.**
- **FCC must implement effective safeguards so that competitors can construct networks and offer competitive alternatives to BOC monopolies without BOC interference.**
- **CPNI, in particular, should be protected to ensure that customers of BOC and other LEC monopolies are not anticompetitively targeted by LEC affiliated CMRS or long distance carriers.**

CRITICAL ISSUES

- The FCC should conclude that the goal of creating effective competitive safeguards is promoted by maintaining the following requirements of Section 22.903:
 - BOCs must not provide any CPNI to a wireless affiliate unless the information is made publicly available on same terms and conditions. (Section 22.903(f)).
 - The wireless affiliate has access to BOC facilities only on compensatory, arm's-length basis which is made available to competitors on same terms and conditions. (Section 22.903(a)).
 - R&D by BOC for wireless affiliate done only on a compensatory basis. (Section 22.903(c)).
 - All transactions between wireless affiliate and BOC must be in writing and available for FCC inspection. (Section 22.903(d)).
- The FCC should not revise the categories of “telecommunications services” to merge local exchange, interexchange, or CMRS buckets.
 - BOCs continue to retain monopoly power that no IXC or CMRS competitor can match.

CUSTOMER APPROVAL REQUIREMENTS

- The FCC has authority to determine type of prior customer approval that is in the public interest.
- In traditionally competitive markets, such as CMRS and long distance, carriers should be given flexibility regarding customer approval.
- In traditionally monopoly markets, such as local exchange, carriers should be held to a strict standard regarding the use of CPNI, obtained merely because customers had no alternative.
 - Customers should provide written authorization for their local telephone CPNI to be used in marketing competitive services.
 - The “Notice and Opt Out” mechanism proposed by some LECs fails to provide adequate information to the BOC customer.
 - LECs should not be able to use CPNI to target certain customers for the purpose of obtaining authorization to market other telecommunications services.

CUSTOMER APPROVAL REQUIREMENTS (Cont'd)

- CPNI authorization must be obtained in advance of -- not concurrent with -- solicitations for competitive service offerings.
- Until LEC markets are competitive, LECs should be required to seek authorization from their customers to release CPNI to all other competing telecommunications carriers as a prerequisite to their use of such information. This ensures that LEC affiliated enterprises do not obtain an anticompetitive advantage merely because of their affiliation.
- The joint marketing authorization for LEC/CMRS services, read together with Section 222, means that such joint marketing can be performed only after LEC customers have given authorization to use their CPNI.

TELECOMMUNICATIONS ACT OF 1996

- Adoption of Section 222 of the Telecommunications Act of 1996 does not invalidate effectiveness of Section 22.903(f) of the Commission's Rules.
- Congress was aware of the restrictions on BOC provision of cellular services because the BOCs lobbied for the elimination of all the Section 22.903 restrictions, but were only successful in obtaining relief from the joint marketing restriction in Section 22.903(e).
- In Section 601(d) of the 1996 Act Congress stated that Bell Operating companies could jointly market and sell CMRS in conjunction with telephone exchange service despite restrictions in Section 22.903 of the Commission's regulations.
- Significantly, Congress did not disturb any of the other restrictions in Section 22.903.
- Therefore, the Commission retains the jurisdiction and the discretion to determine what provisions of Section 22.903 continue to serve the public interest by promoting competition in the wireless arena.

peal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

TITLE VI—EFFECT ON OTHER LAWS

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

(a) APPLICABILITY OF AMENDMENTS TO FUTURE CONDUCT.—

(1) **AT&T CONSENT DECREE.**—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(2) **GTE CONSENT DECREE.**—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the GTE Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(3) **MCCAW CONSENT DECREE.**—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the McCaw Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and subsection (d) of this section and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(b) ANTITRUST LAWS.—

(1) **SAVINGS CLAUSE.**—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(2) **REPEAL.**—Subsection (a) of section 221 (47 U.S.C. 221(a)) is repealed.

(3) **CLAYTON ACT.**—Section 7 of the Clayton Act (15 U.S.C. 18) is amended in the last paragraph by striking “Federal Communications Commission.”

(c) FEDERAL, STATE, AND LOCAL LAW.—

(1) **NO IMPLIED EFFECT.**—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) **STATE TAX SAVINGS PROVISION.**—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

(d) **COMMERCIAL MOBILE SERVICE JOINT MARKETING.**—Notwithstanding section 22.903 of the Commission’s regulations (47

C.F.R. 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services.

(e) **DEFINITIONS.**—As used in this section:

(1) **AT&T CONSENT DECREE.**—The term “AT&T Consent Decree” means the order entered August 24, 1982, in the antitrust action styled *United States v. Western Electric*, Civil Action No. 82-0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

(2) **GTE CONSENT DECREE.**—The term “GTE Consent Decree” means the order entered December 21, 1984, as restated January 11, 1985, in the action styled *United States v. GTE Corp.*, Civil Action No. 83-1298, in the United States District Court for the District of Columbia, and any judgment or order with respect to such action entered on or after December 21, 1984.

(3) **MCCAW CONSENT DECREE.**—The term “McCaw Consent Decree” means the proposed consent decree filed on July 15, 1994, in the antitrust action styled *United States v. AT&T Corp. and McCaw Cellular Communications, Inc.*, Civil Action No. 94-01555, in the United States District Court for the District of Columbia. Such term includes any stipulation that the parties will abide by the terms of such proposed consent decree until it is entered and any order entering such proposed consent decree.

(4) **ANTITRUST LAWS.**—The term “antitrust laws” has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13 et seq.), commonly known as the Robinson-Patman Act, and section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

SEC. 602. PREEMPTION OF LOCAL TAXATION WITH RESPECT TO DIRECT-TO-HOME SERVICES.

(a) **PREEMPTION.**—A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

(b) **DEFINITIONS.**—For the purposes of this section—

(1) **DIRECT-TO-HOME SATELLITE SERVICE.**—The term “direct-to-home satellite service” means only programming transmitted or broadcast by satellite directly to the subscribers’ premises without the use of ground receiving or distribution equipment, except at the subscribers’ premises or in the uplink process to the satellite.

(2) **PROVIDER OF DIRECT-TO-HOME SATELLITE SERVICE.**—For purposes of this section, a “provider of direct-to-home satellite

Historical Note

Introductory text amended by order in Docket No. 94-54, effective October 28, 1996, 61 FR 43977. For Second Report see 4 CR

Introductory text and subsection (d) amended by order in Docket No. 96-6, effective October 28, 1996, 61 FR 45336. For First Report see 3 CR 1190.

Subsection (c) amended by order in Docket No. 94-90, effective April 24, 1995, 60 FR 15490. For Report see 77 RR 2d 431.

Subsection (e) deleted by order in Docket No. 94-54, effective September 23, 1996, 61 FR 38399. For First Report see 3 CR 895.

§22.903 Conditions applicable to former Bell Operating Companies. - [Editor's Note: By Order, FCC 96-319, released August 13, 1996, the Commission granted a waiver of this rule, §22.903, to all Bell Operating Companies with respect to the provision of cellular service outside their in-region service area.] Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, U S West, Inc., their successors in interest and affiliated entities (BOCs) may engage in the provision of cellular service only in accordance with the conditions in this section, unless otherwise authorized by the FCC. BOCs may, subject to other provisions of law, have a controlling or lesser interest in or be under common control with separate corporations that provide cellular service only under the following conditions:

(a) **Access to landline facilities:** BOCs must not sell, lease or otherwise make available to the separate corporation any transmission facilities that are used in any way for the provision of its landline telephone services, except on a compensatory, arm's-length basis. Separate corporations must not own any facilities for the provision of landline telephone service. Access to landline exchange and transmission facilities for the provision of cellular service must be obtained by separate corporations on the same terms and conditions as those facilities are made available to other entities.

(b) **Independence.** Separate corporations must operate independently in the provision of cellular service. Each separate corporation must--

- (1) Maintain its own books of account;
- (2) Have separate officers;
- (3) Employ separate operating, marketing, installation and maintenance personnel; and,
- (4) Utilize separate computer and transmission facilities in the provision of cellular services.

(c) Research or development. Any research or development performed by BOCs for separate corporations, either separately or jointly, must be on a compensatory basis.

(d) Transactions. All transactions between the separate corporation and the BOC or its affiliates that involve the transfer, either direct or by accounting or other record entries, of money, personnel, resources, other assets or any things of value, shall be reduced to writing. A copy of any contract, agreement or other arrangement entered between such entities with regard to interconnection with landline network exchange and transmission facilities must be filed with the FCC within thirty days after the contract, agreement, or other arrangement is made. A copy of all other contracts, agreements or arrangements between such entities shall be kept available by the separate corporation for inspection upon reasonable request by the FCC. The provision shall not apply to any transaction governed by the provision of an effective state or federal tariff.

(e) Promotion. BOCs must not engage in the sale or promotion of cellular service on behalf of the separate corporation. However, this does not prohibit joint advertising or promotional efforts by the landline carrier and its cellular affiliate.

(f) Proprietary information. BOCs must not provide to any such separate corporation any customer proprietary information, unless such information is publicly available on the same terms and conditions.

(g) Provision of other Public Mobile services. Separate corporations may include, as part of their operations, the provision of other Public Mobile services.